is necessary and sufficient that the very nature of the provision of the Treaty in question should make it ideally adapted to produce direct effects on the legal relationship between Member States and those subject to their jurisdiction.
Cf. paragraph 3, summary, Case 26/62 [1963] E.C.R 2.

2. The first paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect. Nevertheless, Article 95 does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting individual rights conferred by Community law. In particular when internal taxation is incompatible with the first paragraph of Article 95 only beyond a certain amount, it is for the national court to decide, according to the rules of its national law, whether this illegality affects the taxation as a whole or only so much of it as exceeds that amount.
Cf. paragraph 2, summary, Case 57/65, Rec. 1966, p. 294.

3. The terms 'directly or indirectly' appearing in the first paragraph of Article 95 of the EEC Treaty must be widely interpreted. By internal taxation imposed directly or indirectly on similar domestic products, this provision refers to all taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which correspond to the stage at which the product is imported from other Member States.

4. The first paragraph of Article 97, which applies where Member States operating a turnover tax according to a cumulative multi-stage tax system have actually exercised the right therein granted to them, does not, in the present state of Community law, create individual rights which national courts must protect. It is therefore not for national courts to appraise whether average rates established by Member States conform to the principles of Article 95.

5. In States which have exercised the power made available to them by Article 97, rates are considered as 'average rates' if they are established as such by the States in question, without prejudice to the operation of the second paragraph of that article.

In Case 28/67

Reference to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling in the action pending before that court between

FIRMA MOLKEREI-ZENTRALE WESTFALEN/LIPPE GMBH, Trockenmilchwerk,

and

HAUPTZOLLAMT (Principal Customs Office) PADERBORN,

on the interpretation of Articles 95 and 97 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and W. Strauß (Rapporteur),

Presidents of Chambers, A. Trabucchi, R. Monaco, J. Mertens de Wilmars and P. Pescatore, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of facts

1. *Origins of the case*

On 15 June 1962 the undertaking Molkerei-Zentrale Westfalen/Lippe GmbH, a dried milk factory incorporated, with limited liability under German law (hereinafter referred to as 'Molkerei-Zentrale'), obtained customs clearance for 'Roller' whole-milk powder which it had imported from Belgium.

Pursuant to German law, the relevant customs office imposed on this import turnover equalization tax (Umsatzausgleichssteuer) at the rate of 4%.

In its action pending before the supreme court, Molkerei-Zentrale maintains in particular that the turnover equalization tax constitutes an infringement of Article 95 of the EEC Treaty, on the ground that German law exempts from the turnover tax both deliveries of domestic whole-milk powder and those of the basic product ('Vorproduct'), that is to say, of domestic milk.

2. *Tenor and grounds of the order referring the matter*

A — On 18 July 1967, the Bundesfinanzhof decided to ask the Court to give a preliminary ruling on the following questions:

'1. (a) Does the Court maintain the judgment given on 16 June 1966 in Case 57/65 under the terms of which the first paragraph of Article 95 of the EEC Treaty produces direct effects and creates individual rights which national courts must protect?

(b) Taking into account its wording, can Article 95 of the EEC Treaty, as a so-called "self-executing" provision, confer upon individuals the right to require before national courts that, despite the as yet unamended terms of the law, they should be placed in the same positions as if the Member State had fulfilled the obligation which this article imposes on it with regard to legislation, whilst under the Treaty (Articles 169 and 170), only the Commission and the other Member States may require the Member State to implement it; in other words, must it be concluded from this that in this connexion the third paragraph of Article 95 has created a breach in the legislative sovereignty of the Member States in the field of internal taxation as well?

2. Is Article 97, under the terms of which only the Commission is authorized to intervene (the second paragraph of Article 97), also directly applicable ("self-executing"), in the sense that it accords to all citizens the right to cause the national court, by means of an application for annulment of the tax assessment and in an individual case, to rule whether the average rate, fixed by the law, is compatible with the principles set out in Article 95?

3. What must be understood by average

rates within the meaning of Article 97? Having regard to the reply to this question, does the disputed rate of turnover equalization tax of 4% applicable to whole-milk powder constitute an average rate?

4. Do citizens of the Community continue to derive from Article 97 the right to have an average rate reviewed by the national courts, even if the Commission has fulfilled its obligation of ensuring that the Treaty is observed or if the Member State has modified the average rate in accordance with the requirement of the Commission?
5. What must be understood by taxation imposed indirectly on domestic products, within the meaning of the first paragraph of Article 95?'

B — The Bundesfinanzhof essentially sets out its own ideas only with regard to Question 1 of its order referring the matter, which constitutes the basis of the other questions.

In this connexion it states as follows:

(a) The preliminary rulings given by the Court of Justice are only binding with regard to the dispute in connexion with which the reference was made. Consequently there is nothing to prevent a court from asking the Court, in another case, to give another ruling on the same question; this principle in fact finds its best application when, as in the present case (cf. below (b)), the previous judgment delivered by the Court gives rise to objections.

(b) Under Article 20(3) of the Basic Law of the Federal Republic of Germany, courts and tribunals shall be bound to give judgment according to the requirements of the law and statutes. The prevailing opinion is that the 'law' includes *inter alia* the 'general rules of international law', which, according to the express wording of Article 25 of the Basic Law, take precedence over statute and give rise directly to rights and obligations for persons living in the Federal Republic. Nothing comparable has been provided for the law of the EEC. No doubt it is generally admitted in Germany that this system takes precedence over national law but the manner in which this precedence is manifested lends itself to controversy.

The judgments in which the Court of Justice has affirmed the direct applicability of certain provisions of the EEC Treaty have generally been interpreted to mean that when a person subject to national jurisdiction claims with justification that a Member State has infringed the Treaty, the national court must place this individual in the same position as if the State in question had already fulfilled its obligations. But this conclusion does not accord with the German judicial system, at least with regard to Article 95 of the EEC Treaty. When the German courts give a ruling as to whether the rate of a specific equalization tax exceeds the turnover tax imposed on similar domestic products, they have no jurisdiction to give binding decisions outside the particular case before them.

It is not for them 'to anticipate, by thousands of separate decisions, the action of the legislature... or to make good its failure to act', especially since Articles 169 et seq. of the EEC Treaty confer on the Community the means to compel the States to observe the Treaty.

Moreover this question of tax law to a large extent comes within the sphere *of fact* and, in a cumulative multi-stage tax system, it is frequently impossible to settle such questions without recourse to estimates. Consequently, it is perfectly conceivable that, although the procedure is perfectly regular, various lower courts may give different decisions, without the court of final instance being able to eliminate those differences.

As it has been generally understood, the judgment of the Court in Case 57/65 could lead to contrary decisions given by the national supreme courts on the one hand and by the Court giving a ruling under Articles 169 and 170 of the EEC Treaty on the other.

The Bundesfinanzhof concludes from all those considerations that there are serious grounds for doubting whether Article 95 is directly applicable, a concept for which it is difficult to find support in the text of that article.

II — Procedure

The order referring the matter was received at the Court Registry on 31 July 1967.

The Government of the Federal Republic of Germany, the Commission of the European Communities and the Molkerei-Zentrale company submitted written observations pursuant to Article 20 of the Protocol on the Statue of the Court of Justice of the EEC and presented oral argument at the hearings on 5, 6 and 7 December 1967.
The Advocate-General delivered his opinion at the hearing on 25 January 1968.
The plaintiff in the main action was represented by Messrs Wendt and Dräger, Advocates of Hamburg, the Government of the Federal Republic of Germany by Mr Everling, Ministerialrat, Mr Hahnfeld, Ministerialrat, and Mr Bülow, Oberlandesgerichtsrat, and the Commission of the European Communities by its Legal Adviser, Mr Thiesing.

III — Summary of the observations submitted by the parties concerned

1. *Question 1*

Molkerei-Zentrale puts forward the following considerations:

The Bundesfinanzhof fails to recognize the fact that, in order to oblige the Member States to fulfil their obligations, the EEC Treaty does not merely provide 'political' means: in fact recourse is also had to the method of direct effect which primarily serves the interests not of individuals but rather of the Community. The principle of the precedence of Community law cannot give rise to difficulties unless there is a conflict with the *constitutional* law of a Member State, which does not occur in the present case.
The Bundesfinanzhof underestimates the weight of its own case-law, which is quite capable of having *de facto* the scope of a principle with regard to a great number of cases of this type. It is untrue, moreover, that this supreme court cannot eliminate inconsistencies which may exist between the decisions of the lower courts with regard to the questions at issue here: these are pure questions of law.
The Court of Justice is called upon not to give a ruling on the German judicial system but to find that there is a duty on the part of the German courts to apply Community law by reason of its precedence.
The Government of the *Federal Republic of Germany* declares that it agrees with the Bundesfinanzhof's objections, especially when it refers to the situation existing in Germany with regard to the judicial system.
The *Commission* expresses the opinion that the considerations set forth by the Bundesfinanzhof do not justify abandoning the interpretation given by the Court in Case 57/65.

In support of its argument it makes the following observations:

The procedures provided for by Articles 169 et seq. of the Treaty which are not available to individuals and the protection which the national courts are called upon to grant to the latter against acts contrary to the Treaty committed by Member States supplement one another. This is all the more expedient as practical reasons frequently mean that the Commission is prevented for a long time from commencing and completing a procedure on the basis of Article 169.
It may happen that individuals can have themselves placed in the same position as if national law had already been amended, whereas the sole result which the Commission or the other Member States may bring about is that the State which is found to have failed to fulfil its obligations shall take the 'necessary measures to comply with the judgment of the Court of Justice' (Article 171 of the EEC Treaty). This a natural consequence of the precedence of Community law.
If the judgment in Case 57/65 has released a flood of applications, both to the administrations and to the courts, the cause is to be sought in the wrong interpretation which has been given to it namely that it declared at the same time that Article 97 was directly applicable. The solution which the Commission puts forward in this connexion (cf. below: Question 2) is such as to reduce the number of applications pending in Germany to reasonable proportions.

2. *Question 2*

The observations of *Molkerei-Zentrale* may be summarized as follows:

The direct applicability of Article 97 is clear from the judgment in Case 57/65.

Article 97 merely constitutes a particular instance of Article 95; thus the national courts have the power and the duty to check whether the rates of taxation which the State concerned states are average rates are in conformity with Article 95.

The fact that the calculation of the charge imposed on domestic products may present difficulties does not mean that direct applicability must be excluded. Moreover, the principal difficulties appear in connexion with the calculation of internal taxation 'imposed... indirectly on similar domestic products' (Article 95); this applies with equal force to instances where Article 95 alone applies.

The outcome is the same when Article 97 is examined in isolation. This provision gives to the Member States a discretion only to the extent to which it leaves them free to decide whether they wish to fix average rates and form groups of products. On the other hand, there is no discretion in determining the charge under the turnover tax, the calculation of the average rates and the decision as to which products may be grouped.

The second paragraph of Article 97 does not weaken this view but, on the contrary, corroborates it. It is intended to strengthen the position of the Commission as against the Member States: in fact the Commission may take immediately binding measures and has no need to begin by issuing an opinion which is not binding under Article 169. The reason is that 'with regard to the application of Article 97, the risk that Member States may indulge in operations which are contrary to the Treaty is particularly great'. This is one more proof that the observance of the objectives of the Treaty, which is ensured by the Commission, must be brought about in a very special manner, in this case by the review which the national court is bound to carry out.

The observations of the *Federal Government* may be summarized as follows:

Even if the Court of Justice were to confirm its case-law in connexion with Article 95, it would be impossible to deduce therefrom any consequence whatsoever with regard to the immediate applicability of Article 97.

(a) This provision cannot have such an effect because it does not lay down a 'clear and unconditional obligation', as is provided for by the judgment in Case 57/65:

- it merely refers to the 'principles' of Article 95;
- the concept of 'average' presupposes that there may be differences in one or other direction, and indicates an assessment in connexion with which there is a certain area of discretion;
- having regard to the difficulties set out below (3), Article 97 must be interpreted as authorizing the usual unavoidable estimates and calculations on a flat rate basis.

(b) The correctness of these considerations is proved by the fact that Article 97 provides special arrangements derogating from Article 169 for the procedure which the Commission must employ if the Member States infringe the Treaty. The reason is that the assessments and estimates necessary for the application of Article 97 require Community supervision; the authors of the Treaty wished to avoid the use of the power of appraisal being directly called in question before the Court of Justice.

If the national courts were able to review the average rates directly, the Commission's power to issue directives would become pointless.

(c) It is impossible to raise against this view the objection that it gives different results in each Member State. As the legal provisions of the various Member States are dissimilar, it is inevitable that certain provisions of the Treaty will only be applied in certain States. Since all the Member States are to introduce the value added tax prior to 1 January 1970, the problems raised by Article 97 are merely transitional.

(d) Community law contains a series of provisions which are addressed exclusively to the States, which are obliged to transform them into provisions addressed directly to individuals. These principally concern matters which encroach upon the national legal systems. These legal systems constitute separate orders within which all legislative provisions are to a certain extent interdependent; this is why the Member States

were left free to insert the Community rules harmoniously into their own legal systems. The equalization tax shows clearly the importance of these considerations. If the concept of directly applicability were admitted, the courts would have to make far-reaching investigations to decide whether the rate of a tax was too high. This would result in too many disadvantages for all persons concerned.

(e) Article 97 is an independent provision, addressed to the Member States which levy a turnover tax calculated on a cumulative multi-stage tax system, and thereby governs cases in which it is impossible to make an actual comparison of the taxes. Although it refers to Article 95, this is merely to avoid repetition. The fact that one provision refers to another does not *ipso facto* imply that it is subordinate to it. Moreover, this reference is only to the 'principles' set out in Article 95.

Similarly the special procedure provided for in the second paragraph of Article 97 makes it impossible to consider this as a 'special case' under Article 95, in that all the rules applicable to that article are also applicable to the first. It might at the most be considered as a '*lex specialis*', although that theory does not take into account the fact that the cumulative multi-stage tax system is applied in five Member States.

The *Commission* in effect agrees with the opinion of the Federal Government.

It makes the following observations:

Article 97 leaves to the Member States a considerable area of discretion, in authorizing them to establish 'average rates' for 'products *or* groups of products'. The Treaty had to provide this facility since in a cumulative multi-stage tax system it is technically impossible to calculate exactly the amount of the taxation imposed at prior stages and thus to prevent any average rates from diverging either upwards or downwards from the actual taxation imposed on the various products.

Those difficulties are further aggravated by the fact that the various Member States apply different methods of calculation to determine the average charge imposed on a product.

Moreover the Member States have a wide discretion to form groups of products, even though more or less arbitrary grouping of products into large groups is not authorized. Similarly the special rules of procedure provided for in the second paragraph of Article 97 tend to indicate that only the Commission is required to ensure that the provisions of this article are observed. Consequently Article 97 does not fulfil the conditions required for producing direct effects. The national courts, however, have the power to consider whether they are faced with a case for the application of Article 97, that is to say, whether they are concerned with an equalization tax intended to replace the turnover tax charged according to a cumulative multi-stage tax system or an average rate applicable to a product or to a group of products.

3. *Question 3*

Molkerei-Zentrale declares that the rate of a charge does not become an average rate by virtue of the sole fact that it has been so described by the legislature.

In this connexion it puts forward the following considerations:

The term 'average' implies that a weighted average must be calculated. A real average rate must of necessity involve an actual comparison of charges, based on up-to-date and reliable statistical data. Moreover account must be taken of the same rate for import and for export (Article 96). Finally, the wording of Article 97 alone indicates that it is only to be applied to rates fixed after 1 January 1958 on the basis of new calculations.

From this it concludes that the rate in dispute is not an average rate.

The *Federal Government* makes the following observations:

The concept of 'average rates' is closely bound up with the difficulties to which a turnover tax on domestic products gives rise within a cumulative multi-stage tax system.

The first difficulty results from the fact that it is extremely difficult to determine with which similar products the imported product is to be compared. The domestic

products are often manufactured by very different production processes. The amount of the turnover tax varies in accordance with the number of commercial processes which the product is required to undergo.

Other difficulties arise when the indirect tax is determined. The comparison must relate to the total tax and cannot be calculated precisely even after lengthy calculations. Moreover, the basic factors in the calculations (price, analysis of costs and structure of the undertakings) undergo constant modifications.

Finally, in view of the multitude of products with which it is faced (more than 50 000), it is 'impossible to require of the administration' completely accurate calculations, 'taking into account the time which this would take, the personnel at its disposal and reasons inherent in the problem itself'. The work required in this connexion would moreover be out of proportion with the result, as, once again, to whatever lengths the consideration was taken, it could only give approximate figures.

Consequently the only remedy for those difficulties is to have recourse to assessments and flat rates; this is in fact the basic idea of the signatory States in adopting the concept of 'average rates' in Article 97. In those circumstances, far from being equivalent to the 'average' of rates calculated exactly, those rates can only represent an exact median value for an aggregate number of cases.

These are the reasons why in the States concerned all the rates of equalization tax are of necessity 'average rates', unless there are in the national territory no similar products or products capable of substitution, with which a comparison might be made. It is of little importance whether the rate under consideration has been fixed before or after the entry into force of the Treaty. Far from conferring fresh powers, Article 97 ratifies the possible existence of rules prior to the entry into force of the Treaty.

It is also of little importance that the rate of the charge has not been modified for some years or that it has been calculated on the basis of statistical data relating to an earlier period. If, for all the products liable to the equalization tax, continual examination of the criteria were to be made in order to take into account any slight variations, the effort would be out of proportion to the result, as on the whole modifications to the charges, whether up or down, would end by offsetting one another. In principle it is for the legislature to decide the groups into which products are to be formed in order to establish the average rates. There is an average rate even when an identical rate of charge is applied to products corresponding to different stages of production.

It is not correct that the average rate ('Durchschnittssatz') must be determined on the basis of the tax imposed on the product with the lowest charge; 'average' ('Durchschnitt') means the median value.

The second part of Question 3 is inadmissible because it concerns the application of the Treaty to a particular case.

The *Commission* makes the following observations:

(a) Only the rates which were fixed on the basis of a comparison made *in concreto* with the turnover tax on domestic products constitute genuine average rates. It follows from this that the expression does not cover, for example, the rates established by a Member State before the entry into force of the Treaty, by exact alignment on the level of the rates imposed on domestic products at the stage corresponding to that of the imports. In cases of this type Article 97 is not applicable. Nevertheless in practice the rates so fixed generally represent only a minimum charge and they consequently conform to Article 95. The truth of this argument emerges from the following considerations.

The charge imposed at a prior stage on similar domestic products constitutes the permitted ceiling for average rates. No doubt, in order to determine what this charge is, recourse may, and indeed must, be had to assessments and average values; but this does not alter in any way the need to calculate genuine averages and to establish the actual charges imposed on each of the categories of products. The 'imposition of a flat rate' ('pauschalieren') is only admissible in connexion, within the specific framework of Article 97, with the establishment of the charge which is permissible on imported products.

(b) A rate calculated on the basis of an estimate can only be an average rate if the estimate is restricted to a minimum average charge which can be justified by valid reasons.
Although it is true that the turnover tax levied on similar domestic products must be calculated on the basis of the most up-to-date statistical information available, the question of the reference period is nevertheless of importance only if the situation has undergone 'appreciable alteration'.
(c) With regard to the second part of Question 3, the Commission supports the argument of the Federal Government.

4. *Question 4*

Molkerei-Zentrale considers that Question 4 should be answered in the affirmative.
Although it admits that cases referred to in this question will be rare, since it may be conceded that the Commission will always ensure complete observance of the Treaty, it declares that if those hypothetical situations nevertheless came about, it must be considered that in the final analysis only the Court of Justice can give a binding ruling on Community law. The *Federal Government* and the *Commission* express the opinion that it is unnecessary to reply to Question 4, since Question 2 must be answered in the negative.

5. *Question 5*

Molkerei-Zentrale observes that by an indirect tax on domestic products there must be understood the direct charge levied on basic products (raw materials, semi-finished products and finished products which are added). On the other hand there should not be taken into consideration the charge on accessory and auxiliary materials, the means of production, transport costs and marketing costs.

The *Federal Government* makes the following points:

As a general rule, the objective of the equalization tax (and this is established by the Treaty) is to offset the turnover tax imposed on comparable domestic products. This objective can only be attained if the total tax on domestic products is taken into account. But from the outset 'natural barriers' are erected, as the imposition of turnover tax has less effect on the price of the final product the further back one goes in considering prior taxation at earlier stages of the basic products in an endeavour to determine the tax. Thus the Member States have resorted to a flat rate in order to determine the tax deriving from the basic products and auxiliary materials.
This then is how the question must be answered; account must be taken of all taxation exigible as turnover tax in the course of the manufacturing cycle of a product, since, in one way or another, it is connected to the product and consequently constitutes an element of its final price.

The *Commission* makes the following remarks:

The *ratio legis* of Articles 95 et seq. indicates that they only refer to 'taxes pertaining to the products' ('produktbezogene Steuern'), which are governed by the principle of the country of destination in almost all modern tax systems. Moreover, the term 'indirectly' must nevertheless be widely interpreted, because the logical application of this principle requires that charges imposed on domestic products be wholly offset. There is nothing to support the view that the authors of the Treaty intended to restrict this application. 'By internal taxation imposed indirectly on a product there must thus be understood not only taxes which were imposed, as taxes pertaining to the product, at all stages of its production, the raw materials, the semi-finished products, and possibly the finished products which are met with in the final product, but also the taxes borne, in the form of taxes pertaining to the product, by the auxiliary materials, the means of production and the services (connected with production) (such as the transport of products, for example) which were employed at all earlier stages, in the course of production of the raw materials, the semi-finished products and the finished products'.

Grounds of judgment

By an order of 18 July 1967, received at the Court on 31 July following, the Bundesfinanzhof (Federal Finance Court), under Article 177 of the Treaty establishing the EEC, put to the Court various preliminary questions concerning the interpretation of Articles 95 and 97 of the said Treaty.

The effects of the first paragraph of Article 95 (Questions 1 and 5)

(1) By the first part of Question 1 the Court is asked whether it 'maintains the judgment which it gave on 16 June 1966 in Case 57/65 under the terms of which the first paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect'.

In the second part of the same question the court making the reference wishes to know whether Article 95 'can... confer upon individuals the right to require before national courts that, despite the as yet unamended terms of the law, they should be placed in the same position as if the Member State had fulfilled the obligation which this article imposes on it with regard to legislation, ... in other words' whether 'the third paragraph of Article 95 has created a breach in legislative sovereignty... in the field of internal taxation as well'.

A — The Bundesfinanzhof states first of all that it finds no support in the provision in question for the interpretation given to the judgment of the Court.

Whether or not this argument is well founded must be considered in the light of both the wording of Article 95 and the character and spirit of the Treaty establishing the EEC. The objective of the EEC Treaty, which is to establish a Common Market the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. The Community constitutes a new legal order, for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

In this connexion it is necessary and sufficient that the very nature of the provision of the Treaty in question should make it ideally adapted to produce direct effects on the legal relationship between Member States and those subject to their jurisdic-

tion. The first paragraph of Article 95 contains a prohibition against discrimination, constituting a clear and unconditional obligation. This obligation is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. This prohibition is therefore complete, legally perfect and consequently capable of producing direct effects on the legal relationships between Member States and persons within their jurisdiction. The fact that this article describes the Member States as being subject to the obligation of non-discrimination does not imply that individuals cannot directly benefit from it.

B — The Bundesfinanzhof points out that this interpretation would result in the recognition of wider rights for individuals than those available to the Community itself. It would oblige the national court to place the persons concerned in the same position as if the Member State had already fulfilled the obligations imposed upon it by Article 95, whereas the Community can merely require the implementation of those obligations.

It is not possible to base an argument—contrary to the interpretation of Article 95 as it follows from the judgment in Case 57/65—on a comparison of the rights conferred by this provision on individuals, on the one hand, and the powers conferred on the Community institutions, on the other. Every time a rule of Community law confers rights on individuals, those rights, without prejudice to the methods of recourse made available by the Treaty, may be safeguarded by proceedings brought before the competent national courts. Such actions are different from the exercise of the powers conferred on the Community authorities under the Treaty, in particular by Articles 95 and 97, together with Articles 155 and 169. In fact proceedings by an individual are intended to protect individual rights in a specific case, whilst intervention by the Community authorities has as its object the general and uniform observance of Community law.

It thus appears that the guarantees given to individuals under the Treaty to safeguard their individual rights and the powers granted to the Community institutions with regard to the observance by the States of their obligations have different objects, aims and effects and a parallel may not be drawn between them.

C — With regard to the interpretation arising from the judgment in Case 57/65 the Bundesfinanzhof objects that it has resulted in a large number of applications to the national fiscal courts.

This argument is not by itself of such a nature as to call in question the correctness of that interpretation.

Furthermore a large proportion of the said applications appears to be based on the mistaken view, as will be shown in the consideration of Question 2, that the effect which Article 95 is acknowledged to have automatically extends to Article 97.

D — The Bundesfinanzhof further alleges that according to German law the fiscal courts do not have the power in this sphere to take decisions the effects of which extend beyond the particular case in question and that it is not 'the proper task of the German fiscal courts to make good by thousands of separate decisions provisions of tax law which have not been passed'; since calculation of the total internal taxation imposed on a domestic product is largely a matter of fact, the lower courts could in like cases give contradictory judgments without the Bundesfinanzhof, the court of last instance, being in a position to harmonize those decisions. In a cumulative multi-stage tax system it is difficult to make 'an actual comparison of the tax imposed', so that the obligations on Member States under Articles 95 and 97 can only be fulfilled by the action of the legislature. Finally, the implementation of Article 95 by national courts might result in contradictory judgments being given by those courts, or by a ruling given by the Court of Justice under Articles 169 et seq. of the Treaty.

These arguments as a whole, which are based on rules of national law, cannot prevail over the rules of law laid down by the Treaty. It is clear from the fundamental principles of the Treaty and the objectives which it is intended to attain that those provisions, so far as by their nature they are capable of doing so, enter into national legal systems without the assistance of any national measure. The complexity of given situations in a State cannot alter the legal nature of a directly applicable Community provision, especially as the Community rule must be applied with the same force in all Member States.

In particular, the prohibition laid down by Article 95 would lose the effect which it derives from the Treaty if the force of this provision depended on national implementing measures not provided for in the Treaty and without which the prohibition itself would have no effect.

Resort by the national courts to Article 177 makes it possible for the Court to ensure a uniform interpretation of the Treaty and is capable of bringing about its identical application. The interpretation arising from the judgment in Case 57/65 applies only to rates of taxation which the national legislature itself does not consider as 'average rates' and with regard to which it has thus admitted that the difficulties indicated by the court making the reference do not exist. Furthermore Article 95 does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting individual rights conferred by Community law.

In particular, when internal taxation is incompatible with the first paragraph of Article 95 only beyond a certain amount, it is for the national court to decide, according to the rules of its national law, whether this illegality affects the taxation as a whole or only so much of it as exceeds that amount.

For all those reasons, there are no grounds for giving a fresh interpretation of the first paragraph of Article 95 of the Treaty.

(2) The Bundesfinanzhof's fifth question seeks to obtain a ruling from the Court on what must be understood by 'internal taxation imposed... indirectly on similar domestic products' within the meaning of the first paragraph of Article 95 of the Treaty.

To the extent to which this question is put having regard to the possible application of Article 97, it is pointless owing to the reply which is to be given to Question 2.

Nevertheless, to the extent to which it relates to the direct application of Article 95 alone, it should be observed that the terms 'directly or indirectly', taking account of the general scheme of the said provision, must be widely interpreted.

The first paragraph of Article 95 refers to all taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which corresponds to the stage at which the product is imported from other Member States, it being nevertheless understood that the effect of this taxation diminishes in proportion as the previous stages of manufacture and of marketing become more remote and that this burden tends rapidly to become negligible. Consequently, when the Member States calculate the taxation imposed indirectly on domestic products, they must observe the conditions and limitations emerging from these considerations.

The observance of these conditions and limitations, in accordance with what has been said above regarding the effects of the first paragraph of Article 95, is subject to review by the competent national courts.

The effects of Article 97 (Questions 2 and 4)

In its second question, the Bundesfinanzhof asks the Court to rule whether Article 97 'accords to all citizens the right to cause the national court, by means of an application for the annulment of the tax assessment and in an individual case, to rule whether the average rate, fixed by the law, is compatible with the principles set out in Article 95'.

In addition, in its fourth question, the Bundesfinanzhof asks the Court to rule whether 'citizens continue to derive from Article 97 the right to have an average rate reviewed by the national courts, even if the Commission has fulfilled its obligation of ensuring that the Treaty is observed or if the Member State has modified the average rate in accordance with the requirement of the Commission'.

The objective of Article 97 is to empower Member States which levy a turnover tax

calculated on a cumulative multi-stage tax system to establish average rates without however permitting them to infringe the principles of Articles 95 and 96.

Although the objectives of Article 95 and 97 thus appear connected and guided by the same aims, Article 97, which provides a rule peculiar to the complexities of the cumulative multi-stage tax system, must nevertheless be distinguished from Article 95 both because of the characteristics peculiar to this system and because of the special methods provided for the implementation of the said Article 97.

Since this provision gives the Member States a discretion of which they may or may not avail themselves to have recourse to average rates, it implies, in the case of States which have used this power properly, the interposition between the rule of Community law and its implementation of legal acts implying a discretion; this means that, in the present state of Community law, such discretion excludes their choice and its consequences from any possibility of the direct applicability of the relevant provisions of Article 97.

On the other hand both the fixing of groups of products and the establishment of average rates remain, in the absence of any Community provision on the method of calculating them, at the discretion of the Member State, exercised under the Commission's supervision, and preclude the direct applicability of Article 97.

In these circumstances Article 97 cannot confer on individuals the individual rights referred to by the present question of the Bundesfinanzhof. This conclusion is confirmed by the second paragraph of Article 97 which requires the Commission to address 'appropriate directives or decisions' to a State establishing average rates which do not conform to the principles of Article 95.

It is therefore apparent from the general scheme of Article 97 that, where a Member State operating the cumulative multi-stage tax system has elected to have recourse to the procedure of establishing average rates, the article does not create individual rights which national courts must protect.

The concept of average rates (Question 3)

In its third question the Bundesfinanzhof asks the Court for a ruling as to 'what must be understood by average rates within the meaning of Article 97 of the EEC Treaty' and whether, 'having regard to the reply to this question, ... the disputed rate of turnover equalization tax of 4% applicable to whole-milk powder constitute(s) an average rate'.

Under the first paragraph of Article 97, it is for the Member States to establish average rates, with the Commission alone having power to intervene, pursuant to the provisions of the second paragraph of Article 97, and in certain circumstances

of Article 169, against the failure to conform to the principles set out in Article 95, without prejudice to the rights conferred by Article 170 on the other Member States.

In these circumstances it is not for the national courts to appraise whether average rates have been established in accordance with the principles of Article 95, although it does not follow that those courts may not in any case be required to decide whether they are faced with an average rate coming under Article 97 or with taxation coming under Article 95.

The application of Article 97 is subject to a double condition; first that the Member State levies a turnover tax based on the cumulative multi-stage tax system and secondly that it has in fact exercised the power made available to it by the said provision and established average rates.

Consequently, in States which have exercised the power made available to them by Article 97, rates are considered as 'average rates' if they are established as such by the States in question, without prejudice to the operation of the second paragraph of that article.

The second part of the third question relates not to the interpretation but to the possible application of the Treaty to a specific case and consequently falls outside the jurisdiction of the Court within the framework of the procedure under Article 177.

Costs

The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities which have submitted their observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Bundesfinanzhof, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Government of the Federal Republic of Germany, the Commission of the European Communities and the plaintiff in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 95, 97, 155, 169, 170 and 177;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the judgment of the Court of 16 June 1966 in Case 57/65,

THE COURT

in answer to the questions referred to it by the Bundesfinanzhof, by order of that court of 18 July 1967, hereby rules:

1. **The first paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect;**

2. **By the expression 'internal taxation imposed directly or indirectly on similar domestic products' the first paragraph of Article 95 refers to all taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which correspond to the stage at which the product is imported from other Member States;**

3. **The first paragraph of Article 97, which applies where Member States operating a turnover tax according to the cumulative multi-stage tax system have actually exercised the right therein granted to them and established average rates does not create individual rights which national courts must protect;**

4. **In States which have exercised the power made available to them by Article 97, rates are considered as 'average rates' if they are established as such by the States in question, without prejudice to the operation of the second paragraph of that article;**

and declares:

It is for the court referring the matter to give a ruling on the costs of the present case.

Lecourt Donner Strauß

Trabucchi Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 3 April 1968.

A. Van Houtte — Registrar

R. Lecourt — President